Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C214/2019

In the matter between:

SSC INFRASEK (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

ANTHONY VERHOOG (*N.O.*) **Second Respondent**

ICHAWU obo MOSES, ADENAAN **Third Respondent**

LABOUR COURT

Date of Set Down: 11 August 2021

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 12h00 on 13 August 2021

Summary: (Review – misconduct – substantive unfairness – inconsistency – failure to consider remorse as a justified basis for imposing different sanctions)

JUDGMENT

LAGRANGE J

Introduction

[1] The third respondent, Mr A Moses ('Moses') was found guilty and dismissed for gross dishonesty for removing a second hand cutter from the second hand tool-shelf of the logistics store and presenting it to the logistics manager, Mr H Spence ('Spence'), as his own in order to receive a new cutter.

[2] The arbitrator confirmed that Moses was guilty of dishonesty and also found there was no procedural unfairness in the conduct of the enquiry.

[3] Nonetheless, the arbitrator found that the dismissal was substantively unfair, because the employer had acted inconsistently in not dismissing other employees who had been found guilty of similar conduct. The crux of his reasoning is set out in paras 23 to 25 of the award:

> '23. The video clearly showed that the applicant had taken the new cutter and seconds later the old one from another shelf. His body language showed that he took the opportunity when Spencer was busy talking. During cross examination the applicant hesitantly answered questions. Spencer was consistent and certain that the applicant was dishonest. The applicant's version was unlikely to be the truth in that he would have produced the old for his reasons. On a balance of probabilities, I find that the applicant was guilty of the misconduct, dishonesty.
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> 24. The respondent's disciplinary code made provision for dismissal for dishonesty and theft cases. However the responsibility had exercised discretion when remorse was shown by some staff. The applicant was dismissed they could simply say "sorry "for being dishonest. There is no real test for remorse. There is no guarantee that dishonesty could be corrected.
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> 25. I find that the inconsistency in the disciplinary action between the applicant and other staff rendered his dismissal unfair. Although he was

LABOUR COURT

> guilty of dishonesty I find that dismissal in the circumstances was inappropriate.'
>
> (*sic*)

The arbitrator did accept that the dismissal was procedurally fair.

[4] The applicant, ('Infrasek') has taken the arbitrator's finding that the dismissal was substantively unfair on review.

The review

[5] The central thrust of the review application is that the arbitrator committed a reviewable irregularity in deciding that no weight should be attached to the admission of guilt and apologies tendered by other employees, who then received final written warnings for dishonesty. Infrasek argues that, by adopting this approach, the arbitrator failed to consider the significance of Moses being unwilling to admit his dishonesty, unlike the other employees.

[6] Effectively the arbitrator had found that the other employees should not have been treated as leniently just because they had admitted guilt and tendered an apology prior to a disciplinary inquiry taking place, because such conduct should not have been equated with true remorse and was not a guarantee those employees' dishonesty could be corrected.

[7] While it is true that there was no guarantee that progressive discipline would be successful merely because dishonesty had been admitted, it does not follow that it put Moses's conduct on a par with theirs. He never apologised or admitted any wrongdoing, so this could never have been a mitigating factor in his favour. If the arbitrator had doubts whether employees who admitted their dishonesty and showed some contrition might re-offend, then he ought to have had little or no doubt that someone who was guilty of dishonesty, but did not admit to any wrongdoing at all, would be even more likely to re-offend.

[8] The difficulty with the arbitrator's approach is that he took a recognised distinguishing factor for differential treatment and treated it in principle as a factor of no significance. This approach was wrong in law and at odds with

LABOUR COURT

the CCMA guidelines on misconduct arbitrations.[1] The result was that he avoided having to consider a material factor he ought to have. Had he not misconstrued the significance of the distinguishing behaviour of the employees in the other cases, he would have found there was good reason to regard Moses's case in a different light and that his dismissal was not substantively unfair.

[9] It is also noteworthy that the employer adopted a consistent approach to all the cases involving alleged dishonesty. It took the form of a pre-hearing opportunity for the employee to explain what they had done. It was the managing director, Mr I Venter ('Venter'), who spoke to the employees and gave them a chance to own up to any dishonesty. In both of the other similar cases of removing items without permission from the store, the employees admitted they had taken the items and they were issued with final written warnings for dishonesty. Venter regarded it as very important that employees who were confronted with alleged dishonesty owned up to it at an early stage, though he even suggested he might have accepted a later admission of dishonesty as deserving of leniency. Moses had claimed that he had simply left his own clippers at home and needed a pair for the day. What Venter found difficult to accept about this explanation was why he had presented a used pair of cutters to the logistics manager instead of simply saying that he had left his own at home. Moreover, if he had left his cutters at home, he did not explain why he never returned the new pair that he had

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[1] See CCMA Guidelines on Misconduct Arbitration (GN R224 in GG 38573 of 17 March 2015) at para 108, viz:

> '108 The CCMA and the Courts have considered the following to constitute circumstances that may justify a different sanction: remorse, provocation, coercion, use of racist or insulting language, and the absence of dishonesty. This is not a closed list.'

See also *South African Municipal Workers Union and Others v Johannesburg Metropolitan Bus Services (Pty) Ltd and Others* (JR 972/12) [2015] ZALCJHB 176 (3 June 2015) at paras [22] and [25]. In para [25], the court held:

> "[25] I am not persuaded that the applicants were able to demonstrate that the Commissioner had not taken into account the principles relating to inconsistency as summarised elsewhere in this judgment. The Commissioner was conscious of the principle that a claim of inconsistency could never succeed where an employer as in this case, was able to differentiate between employees who committed similar transgressions on the basis of, inter alia, differences in personal circumstances, the severity of the misconduct and other merits of employees' respective cases."

LABOUR COURT

been issued with until after his dismissal, bearing in mind that it was several days later that he was confronted with the video footage of him obtaining the used cutters from the store shelf after obtaining the new ones from another shelf. This prompted Venter to convene a disciplinary enquiry.

[10] Venter explained that he accepted people made mistakes, but he was willing to give people a chance if they 'came clean' over small items. Ultimately, he had to be confident that he could trust people when they went to client's premises, and he could not trust someone who was not prepared to take accountability for their actions. The company was engaged, amongst other things, in security installations at clients' premises. On the question of why he could retain those employees who had admitted to their acts of dishonesty, Venter also mentioned that all employees were randomly subjected to lie detector tests, which would indicate any subsequent dishonesty on the part of someone who had been given a final warning for dishonesty.

[11] When Moses testified he said that he was dismissed because he did not tell Venter what he 'wanted to hear', namely the truth. However, the arbitrator and the employer both found that Moses had not been telling the truth. Indeed the evidence overwhelmingly showed deception on his part. He could not give an adequate explanation why he had first picked up the new cutter and then the second hand one if he had been told to fetch a second hand one. There was also no reason advanced why Spensc would have felt something was amiss when he was viewing the CCTV footage, if he had indeed asked Moses to fetch a used pair of cutters, and Moses had done so but also brought the new pair to compare them. Why would he have been suspicious of what he saw, if Moses' version of their interaction was true? Moses also did not provide a plausible explanation why he simply did not say that he had not brought the cutters back. Clearly the arbitrator appreciated all this and that is why he was compelled to conclude that Moses had been guilty of dishonesty.

[12] But his conclusion that Infrasek had acted inconsistently could only have been arrived at by deeming an admission of guilt and expression of contrition prior to a disciplinary inquiry as irrelevant distinguishing factors

LABOUR COURT

when compared with an employee who admitted no wrongdoing and was then found to have been dishonest despite his denials. Since the arbitrator failed to appreciate that such differences in behaviour are indeed perfectly legitimate reasons for imposing different sanctions for the same misconduct, his conclusion that the employer had acted inconsistently cannot stand and must be set aside. It also follows that the justification for treating Moses's case as if it fell into the same category as the others and did not warrant dismissal must also be set aside. In passing, it is interesting to note that the arbitrator also did not even impose a final written warning when he ordered the reinstatement of Moses, which was not consistent with the outcome in those other cases.

Order

[1] The finding of the Second Respondent in the arbitration award issued on 14 February 2019 under case number WECT15257-18 that the Applicant had acted inconsistently in dismissing the Third Respondent, and his consequent finding that the Third Respondent's dismissal was substantively unfair, together with the relief set out in paragraph 28, are reviewed and set aside.

[2] The above-mentioned findings are substituted with a finding that the dismissal of the Third Respondent was substantively fair.

[3] No order is made as to costs.

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Lagrange J
Judge of the Labour Court of South Africa

LABOUR COURT

Representatives

For the Applicant	Adv C Bosch Instructed by N du Preez from Van der Spuy & Partners Attorneys
For the Third Respondent	C Sauls instructed by Herold Gie Attorneys

LABOUR COURT